

EXHIBIT 1 to ADMIN  
MOTION FOR LEAVE TO  
FILE SUR-REPLY

(Redacted Version)

RANDOLPH GAW (S.B. #223718)  
rgaw@gawpoe.com  
MARK POE (S.B. #223714)  
mpoe@gawpoe.com  
SAMUEL SONG (S.B. #245007)  
ssong@gawpoe.com  
VICTOR MENG (S.B. #254102)  
vmeng@gawpoe.com  
GAW | POE LLP  
4 Embarcadero, Suite 1400  
San Francisco, CA 94111  
Telephone: (415) 766-7451  
Facsimile: (415) 737-0642

Attorneys for Plaintiffs AdTrader, Inc., Classic and  
Food EOOD, LML CONSULT Ltd., Ad Crunch  
Ltd., Fresh Break Ltd., and Specialized Collections  
Bureau, Inc.

**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
**SAN JOSE DIVISION**

ADTRADER, INC.,

Plaintiff,

v.

GOOGLE LLC.

Defendant.

Case No. 5:17-CV-07082-BLF

**PLAINTIFFS' [PROPOSED] SUR-REPLY  
IN SUPPORT OF OPPOSITION TO  
GOOGLE'S MOTION TO DISMISS  
CERTAIN CLAIMS IN SECOND  
AMENDED CLASS ACTION COMPLAINT**

Judge: Hon. Beth L. Freeman  
Hearing Date: March 7, 2019  
Time: 9:00 a.m.  
Courtroom: 3

## **SUR-REPLY IN SUPPORT OF OPPOSITION TO MOTION TO DISMISS**

Plaintiffs submit this Sur-Reply in support of their Opposition to Google's Motion to Dismiss Certain Claims in Second Amended Class Action Complaint (ECF 79; 72 ("SAC")). In the four months since Plaintiffs filed that Opposition, Google has since produced more than 68,000 pages of documents in discovery. These documents reveal that despite Google having repeatedly told the Court that Plaintiffs' class action allegations were "frequently false" (*see, e.g.*, ECF No. 25 at 2:9-10; ECF No. 36 at 2:10) it turns out that

[REDACTED]

Plaintiffs do not present this sample of evidence here to rehash the arguments raised in the parties' briefing on Google's pending motion—Plaintiffs' Opposition demonstrates that Google's motion should be denied in its entirety. However, if the Court is inclined to disagree, these additional facts show that leave to amend should be granted. Rule 15 "instructs courts to 'freely give leave when justice so requires,'" and this standard "is applied with 'extreme liberality.'" *See Camacho v. Jefferson Capital Sys., LLC*, No. 14-CV-02728-BLF, 2015 WL 1939071, at \*1 (N.D. Cal. Apr. 28, 2015) (Freeman, J.) (citing *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001).) The evidence described below readily establishes leave to amend here would *not* be futile, as a Third Amended Complaint ("TAC") could plead and rely on such facts to establish Google's liability under all of Plaintiffs' existing class action claims. Moreover, this sample is only a fraction of the *hundreds* of helpful documents that a TAC could draw upon.

The Court may recall that Google argues that Plaintiffs' breach of contract class action claims should be dismissed because Google does not have a contractual obligation to provide refunds/credits for invalid activity based on a straightforward interpretation of the AdX, AdWords, or DBM Agreement. Google also argues that there is no extrinsic evidence showing that any of those contracts are ambiguous with respect to this obligation.

| Category   | Sub-category     | Item       |
|------------|------------------|------------|
| Category 1 | Sub-category 1.1 | Item 1.1.1 |
|            |                  | Item 1.1.2 |
|            |                  | Item 1.1.3 |
|            |                  | Item 1.1.4 |
|            |                  | Item 1.1.5 |
|            | Sub-category 1.2 | Item 1.2.1 |
|            |                  | Item 1.2.2 |
|            |                  | Item 1.2.3 |
|            |                  | Item 1.2.4 |
|            |                  | Item 1.2.5 |
|            | Sub-category 1.3 | Item 1.3.1 |
|            |                  | Item 1.3.2 |
|            |                  | Item 1.3.3 |
|            |                  | Item 1.3.4 |
|            |                  | Item 1.3.5 |
| Category 2 | Sub-category 2.1 | Item 2.1.1 |
|            |                  | Item 2.1.2 |
|            |                  | Item 2.1.3 |
|            |                  | Item 2.1.4 |
|            |                  | Item 2.1.5 |
|            | Sub-category 2.2 | Item 2.2.1 |
|            |                  | Item 2.2.2 |
|            |                  | Item 2.2.3 |
|            |                  | Item 2.2.4 |
|            |                  | Item 2.2.5 |
|            | Sub-category 2.3 | Item 2.3.1 |
|            |                  | Item 2.3.2 |
|            |                  | Item 2.3.3 |
|            |                  | Item 2.3.4 |
|            |                  | Item 2.3.5 |

[illegible]

|    |            |            |            |
|----|------------|------------|------------|
| 1  | [REDACTED] | [REDACTED] | [REDACTED] |
| 2  | [REDACTED] | [REDACTED] | [REDACTED] |
| 3  | [REDACTED] | [REDACTED] | [REDACTED] |
| 4  | [REDACTED] | [REDACTED] | [REDACTED] |
| 5  | [REDACTED] | [REDACTED] | [REDACTED] |
| 6  | [REDACTED] | [REDACTED] | [REDACTED] |
| 7  | [REDACTED] | [REDACTED] | [REDACTED] |
| 8  | [REDACTED] | [REDACTED] | [REDACTED] |
| 9  | [REDACTED] | [REDACTED] | [REDACTED] |
| 10 | [REDACTED] | [REDACTED] | [REDACTED] |
| 11 | [REDACTED] | [REDACTED] | [REDACTED] |
| 12 | [REDACTED] | [REDACTED] | [REDACTED] |
| 13 | [REDACTED] | [REDACTED] | [REDACTED] |
| 14 | [REDACTED] | [REDACTED] | [REDACTED] |
| 15 | [REDACTED] | [REDACTED] | [REDACTED] |
| 16 | [REDACTED] | [REDACTED] | [REDACTED] |
| 17 | [REDACTED] | [REDACTED] | [REDACTED] |
| 18 | [REDACTED] | [REDACTED] | [REDACTED] |
| 19 | [REDACTED] | [REDACTED] | [REDACTED] |
| 20 | [REDACTED] | [REDACTED] | [REDACTED] |
| 21 | [REDACTED] | [REDACTED] | [REDACTED] |
| 22 | [REDACTED] | [REDACTED] | [REDACTED] |
| 23 | [REDACTED] | [REDACTED] | [REDACTED] |
| 24 | [REDACTED] | [REDACTED] | [REDACTED] |
| 25 | [REDACTED] | [REDACTED] | [REDACTED] |
| 26 | [REDACTED] | [REDACTED] | [REDACTED] |
| 27 | [REDACTED] | [REDACTED] | [REDACTED] |
| 28 | [REDACTED] | [REDACTED] | [REDACTED] |

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**II. NEW FACTS SUPPORT PLAINTIFFS' BREACH OF THE IMPLIED COVENANT CLAIMS (COUNT VI).**

Regarding Plaintiffs' breach of the implied covenant of good faith and fair dealing class action claim, there is abundant, indisputable evidence that Google acted in bad faith to deprive advertisers from their expected benefits under their contracts [REDACTED] [REDACTED] y). Some of the new evidence Plaintiffs discovered supporting each of the classes' claims is as follows, and applies to class claims arising under the AdX Agreement and the DBM Agreement:

| Issue      | Evidence   |
|------------|------------|
| [REDACTED] | [REDACTED] |
| [REDACTED] | [REDACTED] |
| [REDACTED] | [REDACTED] |
| [REDACTED] | [REDACTED] |
| [REDACTED] | [REDACTED] |

|    |            |            |
|----|------------|------------|
| 1  | [REDACTED] | [REDACTED] |
| 2  | [REDACTED] | [REDACTED] |
| 3  | [REDACTED] | [REDACTED] |
| 4  | [REDACTED] | [REDACTED] |
| 5  |            | [REDACTED] |
| 6  |            | [REDACTED] |
| 7  |            | [REDACTED] |
| 8  |            | [REDACTED] |
| 9  |            | [REDACTED] |
| 10 |            | [REDACTED] |
| 11 | [REDACTED] | [REDACTED] |
| 12 | [REDACTED] | [REDACTED] |
| 13 | [REDACTED] | [REDACTED] |
| 14 | [REDACTED] | [REDACTED] |
| 15 |            | [REDACTED] |
| 16 |            | [REDACTED] |
| 17 |            | [REDACTED] |
| 18 |            | [REDACTED] |
| 19 |            | [REDACTED] |
| 20 | [REDACTED] | [REDACTED] |
| 21 | [REDACTED] | [REDACTED] |
| 22 | [REDACTED] | [REDACTED] |
| 23 |            | [REDACTED] |
| 24 |            | [REDACTED] |
| 25 |            | [REDACTED] |
| 26 |            | [REDACTED] |
| 27 |            |            |
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[illegible]

Google moved to dismiss the False Advertising Law claims (and by extension, the UCL claims) partly on the grounds that Plaintiffs did not allege how Google's statements were untrue or misleading. The following new facts show that leave to amend with regard to these issues is not futile:

[illegible]

Google's motion should be denied in its entirety, but if necessary, leave to amend should be granted based on the new facts described above.

GAW | POE LLP

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